No. 87-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,

Petitioners,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

MARTIN LONDON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Counsel of Record for Respondent

Of Counsel:

Lewis R. Clayton
Alisa D. Shudofsky
Clyde Allison
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

David L. Schiavone
WILDMAN, HARROLD, ALLEN & DIXON
One IBM Plaza—Suite 3000
Chicago, Illinois 60611
(312) 222-0400

QUESTIONS PRESENTED

1. Should a libel defendant be immune from presumed and punitive damages for false statements made with knowledge of falsity or reckless disregard of the truth, and with express malice toward the plaintiff, merely because the plaintiff is a "public figure" and the statements allegedly involved a matter of "public concern"?

2. Is there any reason to disturb an award of compensatory and punitive damages confirmed after *de novo* review by the Court of Appeals, where: (a) petitioners published to a total audience of 4.6 million people the false charge that respondent was using an immoral advertising strategy employing "pot, wine, beer and sex" to "hook" children on cigarettes; (b) petitioners acted with actual, as well as express, malice; and (c) there was substantial direct and circumstantial evidence of actual injury to respondent's reputation?

3. Should this Court examine the consistent findings of the jury, the District Court and the unanimous Court of Appeals—which reviewed the evidence without deference to the verdict—that petitioners acted with actual malice, where: (a) petitioners admitted they knew the charges in their broadcast were false; (b) petitioners' investigation showed the broadcast was false; and (c) petitioners destroyed selected portions of key documents during the litigation and testified falsely at trial concerning destruction of the documents?

LIST OF PARTIES AND RULE 28.1 LIST

The parties are listed in the petition. Respondent Brown & Williamson Tobacco Corporation, a Delaware corporation, is wholly-owned by BATUS, Inc. of Louisville, Kentucky; BATUS, Inc. is wholly-owned by B.A.T. Industries, plc of the United Kingdom, a publicly-traded corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

PAGE

Other Authorities PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1354

CBS INC., a New York Corporation,
and WALTER JACOBSON,

Petitioners,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

Preliminary Statement

Petitioners ask this Court to create a new constitutional immunity for what is perhaps the least deserving category of speech—falsehoods published with both actual and express malice. The petition raises no legitimate constitutional issue, unless this Court is prepared to replace *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)—a case reaffirmed last month in *Hustler Magazine, Inc.* v. *Falwell*, 56 U.S.L.W. 4180 (U.S. Feb. 24, 1988)—with a near-absolute privilege to defame public figures. Neither this Court nor any Court of Appeals has ever endorsed petitioners' radical view. Such a policy, while no doubt in the economic interest of publishers, would prejudice every public figure, small and great. It would, in the end, disserve everyone—except those who own printing presses.

In this case, the *New York Times* rule was applied by a jury, a District Court and a unanimous Court of Appeals with meticulous care over five years of litigation. The Seventh Circuit panel reviewed—*de novo* and without deference to the verdict—*every* element of respondent's proof, from falsity to damages. What it found was truly a record of press abuse. In a "special report" broadcast four times on Chicago's then-leading news station, petitioners falsely announced to a television audience of 2.5 million that respondent Brown & Williamson Tobacco Corporation was running an immoral advertising campaign using "pot, wine, beer and sex" to "hook" children on cigarettes—themes consciously designed to shock the audience, injure Brown & Williamson, and increase CBS's Nielsens during the national ratings "sweeps" then in progress.

After suit was brought, petitioners clumsily destroyed evidence of their misconduct—destroying only the incriminating *portions* of key documents—and lied about their conduct on the stand. After a close review of the record, the Court of Appeals pointedly noted that the CBS broadcaster "did not accurately testify about his state of mind at the time of the broadcast." (App. 35a-36a) As for the explanation of petitioners' researcher concerning the destroyed evidence, the Court concluded "that even a cursory review of his story reveals that the jury was justified in finding that it was a *complete fabrication*." (App. 30a; emphasis added)

Petitioners erroneously portray this as a test case, posing the question whether presumed and punitive damages are available without proof of "actual injury." But the courts below never addressed that question, because Brown & Williamson presented direct evidence of reputational injury within the meaning of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Petitioners' suggestion that no actual injury was caused by a libel of this character, communicated to millions of people, is fatuous.

Petitioners are as far from the mark when they seek review of the actual malice issue. The record is replete with evidence of knowing and reckless conduct. After the painstaking work of

two courts below, there is no reason for this Court to spend its time triple-checking the verdict.

This case creates no precedent on damages, actual malice or any other question. Petitioners have identified no confusion or debate among the Courts of Appeals that requires intervention by this Court, and they have failed to show why the States should be prohibited from applying their laws where the press broadcasts false statements with malice. In a November 29, 1985 editorial following the liability trial in this case, the Chicago *Sun-Times*—surely not a rabid press critic—wrote that "the Jacobson verdict stakes out no new legal ground. The verdict erodes not one whit of our constitutional freedom." The American press, said the *Sun-Times*, "does not enjoy, nor should it enjoy, the freedom to be intentionally (or recklessly) inaccurate."

Petitioners (and the other influential media organizations who wish to file an amicus brief) seek, for their own selfish ends, to draw a constitutional cloak over intentional press misconduct. Even in cases of malicious falsehood, petitioners would deprive libel victims of damages rules which, this Court has recognized, are necessary to compensate for the inherent difficulty of proving reputational injury. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985). Lacking an effective remedy for defamation, anyone within the increasingly elastic class of "public figures" would be a defenseless target for press abuse. This Court has never placed so trifling a value on reputation. We respectfully submit that the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Summing up its *de novo* review of the record, a unanimous panel of the Court of Appeals wrote:

> [I]t is unfortunate that we are forced to conclude that this case does not involve freedom of the press. Rather, it is one in which there is clear and convincing evidence that a local television journalist acted with actual malice when he

> made false statements about Brown & Williamson Tobacco Corporation. Because false statements of fact made with actual malice are not protected by the First Amendment, this court is required to affirm the district court's finding that Jacobson and CBS libeled Brown & Williamson.

(App. 49a)

The Broadcast

In November 1981 and March 1982, petitioners broadcast four times, to a television audience of 2.5 million in the Chicago area, a "special report" on the cigarette industry containing a malicious libel directed at Brown & Williamson. In 1984, the libel was republished in an issue of the *Saturday Evening Post* seen by 2.1 million readers. (App. 39a) As the Court of Appeals found in its 1983 opinion holding the broadcast libelous *per se*, "[a]ccusing a cigarette company of what many people consider the immoral strategy of enticing children to smoke—enticing them by advertising that employs themes exploitive of adolescent vulnerability—is likely to harm the company." (App. 63a) The Court's view was borne out by Brown & Williamson's proof at trial, including direct evidence of reputational injury.

Although petitioners now label it "commentary," the broadcast was promoted and delivered as an investigative news report. The last in a three-part series concerning the tobacco industry, the libelous broadcast focused on the alleged efforts of cigarette manufacturers to advertise to young people. CBS promoted it with teaser ads declaring: "Tobacco Industry Hooks Children . . . Tonight at 10:00." When the report was broadcast, news reader Harry Porterfield introduced petitioner Walter Jacobson, CBS's co-anchorman, as follows: "For the past two nights in Perspective, Walter has been *reporting* on the companies that make cigarettes and the clout they carry in Washington. Tonight he has the last in his series of *special reports*, a look at *how the cigarette business gets its customers*." (App. 129a; emphasis added)

The camera turned to Jacobson, who reported that the tobacco industry had been spending "a billion dollars a year for bigger and better ways to sell cigarettes" to the "youth of America." (App. 129a) He discussed several specific examples of cigarette advertising, including film clips and pictures of actual ads. Jacobson then capped the broadcast with a detailed description of an advertising campaign allegedly being used by Brown & Williamson's Viceroy brand:

> The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children; that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. Who knows whose fault it is, says the cigarette business.
>
> That's what Viceroy is saying. Who knows whose fault it is that children are smoking? It's not ours. Well, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising. The Viceroy strategy for attracting young people (starters, they are called) to smoking.
>
> "For the young smoker a cigarette falls into the same category with wine, beer, shaving, or wearing a bra," says the Viceroy strategy. "A declaration of independence and striving for self-identity. Therefore, an attempt should be made," says Viceroy, "to present the cigarette as an initiation into the adult world, to present the cigarette as an illicit pleasure, a basic symbol of the growing-up maturity process. An attempt should be made," says [sic] the Viceroy slicksters, "to relate the cigarette to pot, wine, beer, sex. Do not communicate health or health-related points."
>
> That's the strategy of the cigarette-slicksters, the cigarette business which is insisting in public . . . We are not selling cigarettes to children.
>
> They're not slicksters. They're liars.

(App. 130a-31a)

The Trial Evidence

At trial, CBS counsel opened to the jury by promising that petitioners would prove the truth of Jacobson's statements about Viceroy advertising—that Viceroy had really published "pot, wine, beer and sex" ads. That defense collapsed in the middle of trial under the weight of evidence to the contrary. CBS switched to the new theory that Jacobson never actually accused Brown & Williamson of *anything* in the broadcast, that he was merely providing a vague "commentary" about cigarettes and youth. Thus, the petition filed in this Court claims that the broadcast "was not intended to describe current Viceroy advertising, but was intended to support [petitioners'] opinion that cigarette marketing reflects a conscious strategy to appeal to young people . . ." (Pet. at 7)

As the jury and two courts below found, this interpretation of the broadcast is pure sophistry. The broadcast "supported" petitioners' alleged opinions by making the specific charge that Brown & Williamson was running actual ads. This "commentary" detailed a series of *actual* advertising plans, featuring the falsehoods about Viceroy. Jacobson asserted specifically that Viceroy was inducing young people to smoke. The courts below found that the "entire broadcast dealt with methods *actually used* by the cigarette industry to entice children to smoking . . ." (App. 35a; emphasis in original) "Only advertising that children see can persuade them of anything . . ." (*Id.*) Jacobson "stated that the cigarette companies were liars because they were in fact selling cigarettes to children. And the clear message is that Viceroy was doing this through the use of its advertising that relates the cigarette to pot, wine, beer, and sex." (*Id.*) The District Court and Court of Appeals agreed it was "incredible" that Jacobson conveyed this message "inadvertently." (App. 35a)

This is not a case in which petitioners could have believed, in good faith, in an innocent interpretation of the libel. Indeed, the Court of Appeals noted that Jacobson "did not accurately testify about his state of mind at the time of the broadcast." (App. 35a-36a)

Petitioners' mid-trial re-interpretation of the broadcast coincided neatly with the failure of their case on falsity and actual malice. Brown & Williamson put before the jury every Viceroy ad published over a six-year period. Petitioners' witnesses did find evocations of sex and drugs in those ads, but the testimony was so far-fetched that the gallery laughed and petitioners reversed their trial strategy. The testimony showed, moreover, that petitioners knew before they went on the air that there were no "pot, wine, beer and sex" ads. The FTC Staff Report on which the broadcast purportedly relied said *nothing* about actual "pot, wine, beer and sex" ads. (App. 24a) Although petitioners stress the newspaper articles and other materials gathered in their pre-broadcast "investigation," none of those documents indicated that Brown & Williamson had run a single offending ad.

Before it aired the broadcast, CBS knew that the "pot, wine, beer and sex" "campaign" was no more than language lifted out of context from a report prepared in 1975—six years before the broadcast—by a consultant hired by Brown & Williamson's advertising agency. Petitioners conceded they were told unequivocally by a Brown & Williamson representative that the company had immediately rejected the consultant's suggestion, never published or commissioned any ads based upon it, and fired the advertising agency. Jacobson's assistant Michael Radutzky, who performed all the "research" for the broadcast, testified that he looked at "zillions" of ads to find an example of the alleged strategy. His search turned up nothing. But for Jacobson—a broadcaster who, CBS advertises, "pulls no punches" and "will make you angry"—the "pot, wine, beer and sex" theme was too inviting to pass up. Because no examples of the offending ads could be found, petitioners illustrated the broadcast with Brown & Williamson ads showing two packs of Viceroys alongside a golf club and ball. As Judge Posner put it in the Seventh Circuit's 1983 opinion, "the connection

between golf and a strategy of enticing children is obscure." (App. 69a)[1]

At trial, Jacobson eventually conceded the issue of actual malice, when he admitted on the stand that he never believed that Brown & Williamson had run any "pot, wine, beer and sex" ads. (App. 33a-35a) In the face of overwhelming evidence, Jacobson could hardly do otherwise. As CBS counsel finally admitted in closing argument, the idea that Brown & Williamson had actually published such ads was "ridiculous."

Destruction of Evidence

Just as irresponsible as petitioners' false broadcast was their conduct during the litigation. After suit was brought, petitioners selectively destroyed crucial evidence, and then gave perjured testimony attempting to explain how key portions of documents had "disappeared." CBS researcher Radutzky admitted that, after this case was filed, he destroyed the vast bulk of his file—including all the notes of his "investigation," *portions* of the FTC Staff Report that was a critical source for the broadcast, and *portions* of a sample broadcast script. Radutzky testified that he made extensive handwritten notes on his copy of the Staff Report, but the annotated pages of the Report concerning Viceroy were *missing*. Similarly, of the 18 original pages of the sample script, only three were produced, none dealing with Viceroy. The Court of Appeals found that, "[a]s 'luck' would have it," Radutzky "only destroyed the parts of

---

1 It is no coincidence that the broadcast was aired during a "sweeps" period—one of three months each year when national ratings services measure the viewership of each American television station. The pressure to increase sweeps ratings is enormous, because those ratings are a key determinant of advertising rates. Internal CBS documents show that it has a policy of broadcasting sweeps "news" stories that are "aggressive," "good dirt/confrontation/sexy/exciting." In addition to the tobacco series at issue here, CBS sweeps news features—known as "topicals"—have included "Teenage Sex," "Parent Beating," and "Cancer Cures."

the documents that would have been relevant to this litigation." (App. 29a)

Radutzky's "explanation" of this chain of coincidences was, according to the Seventh Circuit, "complete fabrication." (App. 30a) Radutzky claimed he destroyed the documents as part of a general housecleaning. But, the Court noted, "[n]obody cleans house as selectively as Radutzky did." (App. 31a) Nor could Radutzky explain why his "housecleaning" extended to *Jacobson's* desk as well as his own, or why Radutzky was "cleaning" Jacobson's workspace after he had left his job in that section of the newsroom to take on another position at CBS. (App. 31a) The Court added that Radutzky's claim that he thought the case had been terminated was not credible, coming from a veteran journalist who majored in history in college, and worked " 'constantly' on stories involving legal matters." (App. 30a)

The Seventh Circuit determined that "the evidence overwhelmingly supports an inference that Radutzky destroyed the documents in bad faith." (App. 32a)

The Decisions Below

Brown & Williamson filed suit on March 16, 1982. Four months later, in a two-paragraph opinion, the District Court granted petitioners' motion to dismiss "for the reasons set forth in [petitioners'] memoranda." (App. 125a) That summary disposition was reversed in 1983 by the Court of Appeals. 713 F.2d 262 (7th Cir. 1983) (App. 55a). The unanimous panel held that the broadcast was "libel *per se* in the traditional sense." (App. 60a, 63a) Noting several respects in which the broadcast deviated from the FTC Staff Report, the Court also held that the jury could find the broadcast was not a "fair summary" of the Report. (App. 27a-28a)

In November and December 1985, a bifurcated trial was held in the United States District Court for the Northern District of Illinois. After two weeks of testimony, a jury of eight returned a four-part special verdict finding that Brown & Williamson

had proved every element of its libel claim, and that the broadcast was not a fair summary of the Staff Report. The jury then heard a week-long damages case. Brown & Williamson presented the testimony of five witnesses who demonstrated that the broadcast had damaged the company's reputation among customers, suppliers—and even its own employees—in the Chicago area and beyond. The jury returned a verdict of $3 million compensatory damages against both petitioners, $2 million punitive damages against CBS and $50,000 punitive damages against Jacobson. In awarding punitive damages, the jury found that petitioners had acted with common-law express malice, as well as *New York Times* actual malice.

On petitioners' post-trial motions, the District Court independently reviewed the record and affirmed each of the jury's findings on liability. 644 F. Supp. 1240 (N.D. Ill. 1986) (App. 77a). It upheld the punitive damages awards, but struck all but $1 of the compensatory damages verdict, because Brown & Williamson had failed to show pecuniary damages—lost sales or profits. (App. 114a-15a) On appeal, the Seventh Circuit carefully studied the entire record in detail. 827 F.2d 1119 (7th Cir. 1987) (App. 1a). It conducted a *de novo* review of the evidence on all issues, giving essentially "no deference" to the jury's findings. (App. 17a) It thus went beyond the appellate review standards prescribed by this Court in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). *See Connaughton* v. *Harte Hanks Communications, Inc.*, ____ F.2d ____, 14 Media L. Rep. (BNA) 2209, 2222 (6th Cir., Jan. 28, 1988) (*Bose de novo* review extends only to the "ultimate conclusion" of actual malice, not to subsidiary credibility determinations, and not to issues other than actual malice).

In a detailed opinion, the Court of Appeals held that the record fully supported liability and the punitive damages awards. It reversed the District Court's decision to strike the compensatory damages award, finding that the lower court erroneously required Brown & Williamson to prove pecuniary, as opposed to reputational, injury. (App. 41a) As this Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), a defamation

plaintiff is not limited to "out-of-pocket loss," but may also recover for "impairment of reputation and standing in the community," even without "evidence which assigns an actual dollar value to the injury." After examining at length the evidence of actual injury, the Court of Appeals fixed compensatory damages at $1 million—a modest sum given the viciousness of the libel and its circulation to 4.6 million persons. (App. 39a, 46a-47a)[2]

REASONS FOR DENYING THE WRIT

1. The awards of compensatory and punitive damages are fully supported by the record. Petitioners' contention that no "actual injury" was proven ignores the extensive evidence presented below, and incorrectly equates reputational injury with pecuniary damages. Publication of petitioners' lurid charges to a total of 4.6 million people caused Brown & Williamson grave injury. The award of punitive damages—equal to .0013 of CBS's net worth and less than .01 of Jacobson's—was supported by findings of *both* actual and express malice, and richly justified by petitioners' outrageous conduct.

2. Petitioners' attacks on the constitutionality of presumed and punitive damages where actual malice is shown are baseless. In *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985), this Court endorsed presumed damages in view of the "experience and judgment of history" that specific proof is difficult even where "it is all but certain that serious harm has resulted in fact." And *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 160 (1967), squarely rejected the argument pressed by petitioners that the media should be exempted from punitive damages in a public figure case concerning speech of public concern. Petitioners have failed to identify a single relevant decision adopting their views, much less an active controversy among the Courts of Appeals.

---

2 The courts below also rejected without hesitation petitioners' argument that the broadcast was protected "opinion." As shown above, the broadcast leveled specific factual charges at Brown & Williamson.

3. Petitioners' willful disregard of the facts learned in their "investigation" and their egregious misconduct amply justify—indeed, compel—a finding of actual malice. There is no legitimate reason for this Court to add a new level of review to the unanimous conclusions of eight jurors and four federal judges.

This case presents no "special and important reasons beyond the academic or the episodic" to merit certiorari. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

I

THE DAMAGE AWARDS RAISE NO ISSUE THAT MERITS REVIEW

"False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler Magazine, Inc.* v. *Falwell*, 56 U.S.L.W. 4180, 4181 (U.S. Feb. 24, 1988). This case involves the lowest rung in the hierarchy of speech—statements determined to be false, and made with actual and express malice. In seeking constitutional protection for their misconduct, petitioners ignore the caution of *Herbert* v. *Lando*, 441 U.S. 153, 172 (1979): "Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter the publication of unprotected material threatening injury to individual reputation." This Court has consistently rejected attempts to expand *New York Times* into an absolute shield for the press.[3] Indeed,

---

3 For example, the Court has time and again held that First Amendment interests do not justify heightened procedural protections for libel defendants. *Calder* v. *Jones*, 465 U.S. 783, 790-91 (1984) (no special jurisdictional rules); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 n. 12 (1984) ("[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no First Amendment privilege bars inquiry into editorial process).

some members of the Court have asserted that the prohibitive actual malice standard trenches upon the compelling "interest of those who have been defamed in vindicating their reputation." *Dun & Bradstreet*, 472 U.S. at 767 (White, J., concurring).

Brown & Williamson was required by the courts below to meet all the strict requisites of *New York Times* and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Indeed, the District Court went *beyond* those precedents by instructing the jury that punitive damages could be awarded only on a finding of express, common-law malice, in addition to *New York Times* actual malice. Once it is established that a publication is false—"there is no constitutional value in false statements of fact," *Gertz*, 418 U.S. at 340—and uttered with actual malice, the press forfeits any claim to constitutional protection. The Court held in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 152-53 (1967) that:

> [N]either the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press.

Seven years after *Curtis*, in *Gertz*, this Court crafted the rule that presumed and punitive damages are not recoverable unless actual malice is proven. 418 U.S. at 349. Every Court of Appeals to pass on the question has interpreted *Gertz* to mean that, when actual malice is shown, the normal damage rules of libel law apply without restriction. (*See infra* at 15, 19) Just a few weeks ago, this Court stressed that *New York Times* and its progeny do not "mean that *any* speech about a public figure is immune from sanction in the form of damages." *Hustler Magazine, Inc.*, 56 U.S.L.W. at 4181 (emphasis in original).

Petitioners' suggestion that actual malice is an unsuitable test for enhanced libel damages is nothing less than a frontal assault on *New York Times*, *Gertz* and a host of other cases. For 24

years, this Court has relied on the concept of actual malice to mark the boundary of federal intrusion into state libel law. And, with *Hustler*, the Court has put actual malice into service to limit the reach of the tort of intentional infliction of emotional distress. Petitioners are wrong in their assertion that the States have no interest in permitting damages in excess of "actual injury" against irresponsible press defendants. To the contrary, the damage limitations of *Gertz* do not apply where actual malice is proven, "for where such malice is present there is no good-faith attempt to point out real abuses to the public. There is only an unsubstantiated attack on the character, reputation and good name of a particular individual." *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (footnote omitted).

There is no legitimate reason to extend protection to statements that are not only false, but maliciously so. The American press already enjoys extraordinary insulation from liability. Even studies by observers sympathetic to the press have documented the media's arrogance and remarkable insensitivity to criticism. *See* R. Bezanson, G. Cranberg and J. Soloski, *Libel Law and the Press: Myth and Reality* 40-51 (1987). That attitude is, at least in part, an undesirable by-product of the *New York Times* rule. In this context, adoption of petitioners' views can only encourage irremediable injury to future subjects of press reports.

A. The Award of Compensatory Damages is Fully Supported in Fact and in Law

Petitioners ask this Court to limit drastically the centuries-old doctrine of presumed damages. That request flies in the face of the Court's endorsement of presumed damages in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In that case, not involving speech of "public concern," presumed damages were available merely on a showing of *negligence*. The *Dun & Bradstreet* Court observed:

> The rationale of the common-law rules has been the experience and judgment of history that "proof of actual dam-

> age will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. Restatement of Torts § 568, Comment b, p. 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective.

Id. at 760-61 (citations omitted).

Presumed damages do not represent, as petitioners contend, recovery distinct from real, reputational injury. Rather, they merely "approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 2545 (1986). *See also* R. Sack, *Libel, Slander, and Related Problems* 347 (1980). No more than a natural and necessary inference from the trial proof, presumed damages are restrained by the good sense of the jury, and, as this case illustrates, the careful scrutiny of reviewing courts. Consistent with these principles, the lower courts have not hesitated to approve presumed damages awards. *See, e.g.*, *Gertz* v. *Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) ("because there was evidence of actual malice . . . Illinois law would permit, and the Constitution would not prohibit, presumed damages."); *Carson* v. *Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Price* v. *Viking Press, Inc.*, 625 F. Supp. 641, 650 (D. Minn. 1985).

We hasten to add that the compensatory damages awarded Brown & Williamson here rest only in small measure on a presumption of injury. It is noteworthy that, over Brown & Williamson's objection, the jury was told nothing about any "presumption" of injury. Instead, it was instructed to award "only such damages as will reasonably compensate [respondent] for such injuries and damages" sustained as a "proximate

result" of the broadcast. Brown & Williamson's damages were supported by direct proof. As the Court of Appeals predicted in its 1983 opinion:

> Accusing a cigarette company of what many people consider the immoral strategy of enticing children to smoke—enticing them by advertising that employs themes exploitive of adolescent vulnerability—is likely to harm the company. It may make it harder for the company to fend off hostile government regulation and may invite rejection of the company's product by angry parents who smoke but may not want their children to do so. These harms cannot easily be measured, but so long as some harm is highly likely the difficulty of measurement is an additional reason, under the modern functional approach of the Illinois courts, for finding libel *per se* rather than insisting on proof of special damage.

(App. 63a)

Thus, the testimony at trial demonstrated the pervasive effect of the broadcast in the Chicago area. The Seventh Circuit's 1987 decision summarized the evidence of reputational injury as follows:

> First, Brown & Williamson's general counsel testified that after the broadcast there were calls from the field sales force indicating that their contacts were asking "how in the world could Brown & Williamson have done such a thing." Second, a department sales manager for Brown & Williamson testified that sales managers in the Chicago area had received negative comments from distributors, retailers, and consumers. The reports he received indicated that the sales staff had been disrupted in their normal activities by questions from retailers and consumers about the broadcast. Third, the former Vice President of Marketing for Brown & Williamson testified that the company had a reputation it cared about and that he believed that Viceroy's customers care about the reputation of the company from which they buy cigarettes. He also testified that the company's reputation among governmental entities

> was important because the cigarette industry is such a closely regulated industry. Fourth, the company introduced evidence that the Perspective (including its rebroadcasts) was seen by over 2.5 million people in the Chicago area. In addition, over two million people read a 1984 article in the *Saturday Evening Post* which repeated some of the most damaging portions of the Perspective.

(App. 39a) In addition, a Chicago cigarette wholesaler unaffiliated with Brown & Williamson testified about the industry's affairs, and the impact and circulation of petitioners' libel in the Chicago community.

Petitioners' claim that their libel caused no "actual injury" is astonishing. In fact, the broadcast was all the more damaging because of petitioners' promotional efforts designed to create an image of CBS and Jacobson as reliable, credible sources of news. In a pretrial memorandum, petitioners offered to stipulate that "WBBM news programs and Mr. Jacobson's Perspectives are perceived to be reliable sources of information and that WBBM's audience *believes* what WBBM broadcasts" (emphasis added). As the Court of Appeals noted, the broadcast was made "in one of the largest television markets in the country," by "a veteran journalist who was trusted by the public and promoted by his employer as someone who 'always leave[s] you informed.' " (App. 46a) Furthermore, "the text of the broadcast carried a very substantial sting that must have hurt both the reputation of Brown & Williamson and its parent company (which as CBS's counsel pointed out at trial owns one of the most respected department stores in Chicago) [Marshall Field's]." (*Id.*)

Brown & Williamson proved "impairment of reputation and standing in the community," *Gertz*, 418 U.S. at 350, through direct testimony. The damage inflicted was massive because the libel was vicious, widely circulated and broadcast repeatedly on Chicago's then-most popular news program. There is no basis for petitioners' attack on the compensatory damages award.

B. The Punitive Damages Awards Are Fully Justified

Petitioners ask the Court to limit punitive damages to "cases of truly malicious conduct involving deliberate lies or calculated falsehoods." (Pet. at 19) The jury and the two courts below all recognized this as *just* such a case. CBS's egregious misconduct, both before and after the broadcast, mandated a punitive damages award.

As this Court held in *Curtis*, specifically rejecting a constitutional challenge, "punitive damages serve a wholly legitimate purpose in the protection of individual reputation," 388 U.S. at 161, and "the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts . . . and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted." *Id.* at 160. In *Davis* v. *Schuchat*, 510 F.2d 731, 737-38 (D.C. Cir. 1975), the court wrote:

> As Justice Brennan recognized in *Rosenbloom*, the First Amendment requires that press and speech comment on matters of public interest be given the wide latitude granted by the *Times* standard. Once that latitude is exceeded, however, we fail to perceive that any further purpose is served by eliminating traditional punitive damages, which have always been subject to correction for excessiveness.

Under the precedents of this Court, as well as Illinois law, punitive damages may be constitutionally awarded in a libel case upon a showing of actual malice. *Gertz*, 418 U.S. at 349; *Fopay* v. *Noveroske*, 31 Ill. App. 3d 182, 334 N.E.2d 79, 92 (5th Dist. 1975). In this case, the District Court required even more—proof of common-law malice—and Brown & Williamson met that heavy burden. (App. 122a)

Petitioners present no authority for their contention that a libel defendant should be immunized from punitive damages solely because the victim was a public figure, and/or the libel concerned a matter of public interest. Such a rule would excuse libel defendants from the full consequences of conduct such as

that evidenced here: publication of a calculated lie for the purpose of injuring respondent and hyping CBS's ratings. Moreover, after the jury verdict on liability, petitioners defiantly proclaimed that they would continue their irresponsible conduct. That recalcitrance further justified punitive damages. *See Goldwater* v. *Ginzburg*, 414 F.2d 324, 341 n.27 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

There is no shortage of cases upholding punitive damages in situations involving public figures and matters of public concern. *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1029-30 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Buckley* v. *Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (punitive damages available even where no more than nominal compensatory damages awarded); *Carson* v. *Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 478-79 (9th Cir. 1977); *Davis* v. *Schuchat*, 510 F.2d 731, 737 (D.C. Cir. 1975); *Goldwater* v. *Ginzburg*, 414 F.2d at 340-41. *See also Brown & Williamson Tobacco Corp.* v. *Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983) ("actual, general, and punitive" damages recoverable on proof of actual malice).

Petitioners' claim that that actual malice does not alone justify punitive damages is no more than a matter of academic interest in this case. The courts below also found proof of *express* malice. (App. 122a) The authorities discussed above show that actual malice is indeed sufficient for punitive damages, but that issue is not presented on this record.

Petitioners do not and cannot contend that the punitive damage awards—representing minute fractions of petitioners' great wealth—were in any sense excessive. Brown & Williamson's attorneys' fees at the time of trial, a relevant factor under Illinois law, alone amounted to more than two-thirds of the punitive damages awards. (App. 123a) Drawing on all this evidence, the District Court and the Seventh Circuit upheld the awards without hesitation. (App. 47a-48a)

C. The Damage Award Presents No Eighth or Fourteenth Amendment Issue

No more availing is petitioners' argument that the damage awards offend the Fourteenth and Eighth Amendments. There is no "constitutional flaw" (Pet. at 27) in this case because, as discussed above, there is clear and convincing proof of actual malice, substantial proof of actual injury to Brown & Williamson's reputation, and compelling evidence of common-law malice. Nor is there any "gross disproportion" between the compensatory and punitive damage awards. None of petitioners' authorities discussing the Fourteenth and Eighth Amendments are apposite.[4]

Petitioners' complaint about "standardless and deferential appellate review" of First Amendment cases is meritless. The reversal rate in libel cases is staggeringly high and, more importantly, the Court of Appeals in this case made a searching review of the record. Far from being "deferential," the Seventh Circuit reviewed *de novo* every aspect of the record, and slashed the compensatory damages award by two-thirds. In view of their gross misconduct, it ill-behooves petitioners to question the constitutional validity of this award or the diligence of the courts below.

---

4 *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), did not even reach the issue of whether an excessive punitive damage award may violate the Fourteenth and Eighth Amendments. And *Banker's Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (oral argument Nov. 30, 1987), involves the issue of whether an award of punitive damages that is "grossly disproportional" to the award of actual damages constitutes an excessive fine prohibited by the Eighth Amendment. Petitioners do not argue, nor could they, that an issue of proportion is presented here. The punitive damages awards in this case clearly are not excessive or unduly burdensome for petitioners. In addition, as one court has held, the Excessive Fines clause "has no application to a civil proceeding involving a punitive claim ancillary to a civil cause of action." *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984) (*en banc*).

II

THE JURY AND TWO LOWER COURTS EACH CORRECTLY FOUND ACTUAL MALICE

Petitioners and respondent have litigated actual malice five times in this case, always with the same result. The District Court found actual malice on three occasions, denying CBS's motions for summary judgment, directed verdict and judgment notwithstanding the verdict. The jury found actual malice in response to a special interrogatory. The Court of Appeals found actual malice in its painstaking 1987 opinion. Petitioners raise the issue here only out of reflex.

It is difficult to imagine a more "clear and compelling" case of actual malice. We briefly summarize the evidence here, and respectfully refer the Court to the detailed opinions of the courts below.

1. *Petitioners' Admission*. Jacobson conceded on the stand that he never believed Brown & Williamson had ever published a "pot, wine, beer and sex" advertisement. As the courts below held, it is "inconceivable" petitioners did not intend to state in the broadcast that respondent was indeed circulating such ads. Jacobson's testimony thus "constitutes an admission on the issue of actual doubt or reckless disregard of the falsity of the broadcast." (App. 95a) The fact-finders below firmly rejected petitioners' jesuitical re-interpretation of the broadcast. *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), on which petitioners rely, concerned a "rational interpretation" of a document that "bristled with ambiguities." 401 U.S. at 290. It does not apply to the incredible interpretation of the broadcast that petitioners cooked up in the heat of trial.

2. *Deliberate Distortion of the FTC Staff Report*. Petitioners knew from the plain language of the FTC Staff Report—their main source—that "pot, wine, beer and sex" did not describe a real ad campaign. It was instead an observation from a six-year old report prepared by a consultant hired by Brown & Williamson's outside advertising agency. Yet the broadcast portrayed the Staff Report as proof that Brown & Williamson had en-

dorsed this "strategy" and was currently running "pot, wine, beer and sex" ads.

3. *Petitioners' Own Investigation Proved Falsity.* All the evidence turned up in Radutzky's investigation showed that the broadcast was false. None of the news articles Radutzky gathered asserted that Brown & Williamson had ever published a "pot, wine, beer and sex" ad. The Brown & Williamson spokesman with whom Radutzky spoke said explicitly that the company had rejected the "strategy" and fired its advertising agency. (Radutzky chose not to call the agency itself.) And, despite his review of "zillions" of cigarette ads, Radutzky was unable to come up with a single example of the offending advertising.

4. *Selective Destruction of Evidence and False Trial Testimony.* Perhaps the most compelling evidence of actual malice was petitioners' bad faith, selective destruction of evidence, and their false trial testimony about the circumstances of the destruction. Petitioners now brazenly contend that their act of bad faith should not be held against them, and that no inference should be drawn from the destruction of crucial evidence. That, of course, is just the result Radutzky hoped for when he purged his files of damning documents. By no stretch of the imagination does the First Amendment require society to condone obstruction and perjury when accomplished by the press.[5]

On this record, no further consideration of actual malice is warranted.

---

5 Petitioners' assertion notwithstanding, both CBS and Jacobson were properly held responsible for the conduct of their employee, Radutzky, and his malice is imputed to them. Restatement (Second) of Agency §§ 219(2), 228(1) (1958); *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 564, 566-67 (1982). Petitioners' contention that an employer is not responsible for actions of an employee which are "contrary to policy" is frivolous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
March 16, 1988

Respectfully submitted,

MARTIN LONDON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Counsel of Record for Respondent

Of Counsel:

Lewis R. Clayton
Alisa D. Shudofsky
Clyde Allison
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

David L. Schiavone
WILDMAN, HARROLD, ALLEN & DIXON
One IBM Plaza—Suite 3000
Chicago, Illinois 60611
(312) 222-0400